Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors

HIGH COURT (MIRI) — ORIGINATING SUMMONS NO 24-22 OF 1998 (MR)
ELIZABETH CHAPMAN JC
30 JULY 1998

Arbitration *— Agreement — Jurisdiction of court — Parties have ongoing arbitration being conducted under the UNCITRAL Arbitration Rules — Whether court has jurisdiction to entertain application for audit of defendant's accounts and records — Delay in making request for audit — Whether application should be allowed — Arbitration Act 1952 s 34(1)*

Both the plaintiff and the defendants were parties to a contract ('the contract') and had an ongoing arbitration being conducted under the UNCITRAL Arbitration Rules at the Kuala Lumpur Regional Centre for Arbitration in accordance with cl 28(6) of the contract. On 19 November 1997, the plaintiff applied to the arbitration tribunal for an order that the defendants facilitate an audit of defendants' accounts and records. The tribunal refused the application. The plaintiff applied to this court for a declaration that it is entitled to exercise its right to audit pursuant to cl 19 of the contract.

Held, dismissing the application with costs:

This application fell within s 34(1) of the Arbitration Act 1952. The reliefs sought had been referred to and decided upon by the tribunal; in any event, under cl 28(6) both parties had agreed to refer all disputes to arbitration and the same was in existence. The court's jurisdiction was clearly excluded by statute. Therefore, the court had no jurisdiction to entertain the application. Furthermore, the plaintiff's request for audit was made at a very late stage, for the right of audit under cl 19 of the contract had already expired. In any event, the order sought in the application was far too wide as there was no limitation imposed on the document by reference to subject or purpose (see pp 621I and 622A–C); *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors* [1998] 2 MLJ 20 followed.

[Bahasa Malaysia summary

Kedua-dua plaintif dan defendan-defendan merupakan pihak-pihak kepada suatu kontrak ('kontrak tersebut') dan terlibat dalam timbangtara yang sedang berjalan di bawah Kaedah-Kaedah Timbangtara UNCITRAL di Pusat Serantau Timbangtara Kuala Lumpur menurut fasal 28(6) kontrak tersebut. Pada 19 November 1997, plaintif memohon kepada tribunal timbangtara untuk satu perintah bahawa defendan-defendan memudahkan suatu audit akaun dan rekod defendan-defendan. Tribunal tersebut telah menolak permohonan. Plaintif memohon kepada mahkamah ini untuk satu

perisytiharan bahawa ia berhak melaksanakan haknya untuk mengaudit menurut fasal 19 kontrak tersebut.

Diputuskan, menolak permohonan dengan kos:

Permohonan ini dirangkumi oleh s 34(1) Akta Timbangtara 1952. Relief yang diminta telah dirujuk dan diputuskan oleh tribunal tersebut; bagaimanapun, di bawah fasal 28(6) kedua-dua pihak telah bersetuju merujuk segala pertikaian kepada timbangtara dan yang sama juga wujud. Bidang kuasa mahkamah jelas dikecualikan oleh statut. Maka, mahkamah tidak mempunyai bidang kuasa untuk melayan permohonan ini. Tambahan pula, permintaan plaintif untuk audit dibuat pada tahap yang amat lewat, kerana hak audit di bawah fasal 19 kontrak tersebut telah pun tamat tempohnya. Bagaimanapun, perintah yang diminta dalam permohonan adalah terlalu luas kerana tiada had masa yang dikenakan ke atas dokumen dengan merujuk kepada subjek atau tujuan (lihat ms 621I dan 622A–C); *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors* [1998] 2 MLJ 20 diikut.]

Notes

For cases on jurisdiction of court, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 710–712.

Case referred to

Sarawak Shell Bhd v PPES Oil & Gas & Ors [1998] 2 MLJ 20 (folld)

Legislation referred to

Arbitration Act 1952 ss 25(2), 34(1)

Jimmy HT Wee (*Jimmy HT Wee*) for the petitioner.
Victor Wong (*Victor Wong & Chiew*) for the defendants.

Cur Adv Vult

Elizabeth Chapman JC: The plaintiff by this application seeks a declaration that it is entitled to exercise its right to audit of the defendants' accounts and records pursuant to cl 19 of the contract. Further, the plaintiff seeks an order that the defendants permit the plaintiff and/or its authorized representative full and unrestricted access to the first, second and third defendants' accounts and records pertaining to Contract No 588116.

At the hearing of this application, the defendants through their counsel gave an undertaking to preserve whatever documents and records presently in their possession until determination of this application. Both the plaintiff and the defendants have filed several affidavits in this application

A and what is apparent from the affidavit evidence is that there is, as between the parties, an ongoing arbitration being conducted under the UNCITRAL Arbitration Rules at the Kuala Lumpur Regional Centre for Arbitration in accordance with cl 28(6) of the contract. Contract No 588116 contains an arbitration agreement under cl 28(6) and by cl 19(1) the plaintiff is
B granted the right to audit all documents or records of the defendants and the subcontractors for the purposes of reviewing costs and quantities of reimbursable items or for any other reasonable purpose. Further, in cl 19(3) this right of audit is restricted to a period of two years after a date on which the work is certified as complete or after termination of the contract. The work was certified as completed on 31 January 1998. On 19 November
C 1997, the plaintiff applied to the arbitration tribunal for an order that the defendants facilitate an audit as requested, this was resisted by the defendants. The defendants had on 26 November 1997 written to the tribunal stating that the right to audit was restricted to verification of reimbursables and the valuation of reimbursables was not in dispute. The
D plaintiff on the other hand, submitted to the tribunal that its right of audit extends beyond verification of costs of reimbursables to 'any other reasonable purpose'. Whilst the tribunal did not accept the defendants' position that the right to audit is restricted to reimbursables, it however informed the plaintiff that 'if the respondent wishes to pursue this request, it should explain with full particularity the purpose of such an audit at this
E late stage when arbitral proceedings have been underway for over a year'. On 20 January 1998, the tribunal, after considering both the plaintiff's and the defendants' submission, informed them of the tribunal's refusal to grant the request for an audit.

It is imperative, in my view, to consider very carefully the scope and
F applicability of s 34(1) Arbitration Act 1952. The said s 34(1) provides:

> Notwithstanding anything to the contrary in this Act or in any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held ... under the United Nations Commission on International Trade Law Arbitration Rules and the Rules of the Regional
G Centre for Arbitration at Kuala Lumpur.

In *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors* [1998] 2 MLJ 20, it was held that 'taking the plain meaning of the words in s 34(1) of the Act, the effect of this section was to exclude altogether not just s 25(2) but the entire Act and all other written law from arbitrators held under the
H Rules. Further, as to the word "held" all that needs to be asked is whether there is an arbitration in existence. This was satisfied as soon as notice of arbitration was received by the appellant'. Further at p 25, the court went on to say that 'for the avoidance of any doubt, we now categorically say that these two decisions should not be understood to have left open the
I possibility that the court had some other power to intermediate in the arbitrations at the centre whether by way of inherent jurisdiction or at common law or otherwise'.

This present application falls within s 34(1) of the Arbitration Act 1952. The reliefs sought have been referred to and decided upon by the

tribunal; in any event, under cl 28(6) both parties had agreed to refer all disputes to arbitration and the same is in existence. The court's jurisdiction is clearly excluded by statute. I therefore hold that the court has no jurisdiction to entertain this application. Be that as it may, it should be noted that the plaintiff's request for audit was made at a very late stage, for the right of audit under cl 19 of the contract expired on 31 January 1998. The plaintiff is not precluded from cross-examining witnesses in the arbitration itself and it is open to the plaintiff to challenge the veracity of the invoices or the authenticity of the payments or variations within the arbitration. In any event, the order sought under prayer (2) of the application is far too wide as there is no limitation imposed on the document by reference to subject or purpose.

For these reasons stated, this application is dismissed with costs.

Application dismissed with costs.

Reported by Loo Lai Mee